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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 STEVEN CRAIN,

11 Plaintiff,

12 v.

13 RONALD N. TUTOR, et al.,

14 Defendants.
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Case No. 2:08-cv-01808-KJD-RJJ

ORDER

16 Presently before the Court is Defendants' Motion to Dismiss (#10). Plaintiff filed a Response
17 in Opposition (#17), to which Defendants filed a Reply (#23).

18 **I. Facts and Procedural History**

19 On July 1, 2007, Plaintiff began working for Defendant Perini Building Company ("Perini")
20 as a journeyman plumber. In October 2008, two non-party co-employees allegedly began to harass
21 Plaintiff, calling him "gay, queer, and/or fag." (Compl. at 3.) Although Plaintiff does not identify
22 himself as homosexual, he was offended by the words and allegedly reported his co-workers'
23 misconduct to management, Defendants Michael Perry and Tim Hensley. Plaintiff alleges that in
24 that conversation he also divulged other misconduct by those same co-employees. On December 8,
25 2008, Plaintiff's employment with Perini was terminated. Plaintiff filed a grievance with the local
26 union against Perini and its management on December 9, 2008. Plaintiff did not, however, file a

1 claim with the Equal Employment Opportunity Commission (“EEOC”). On December 23, 2008,
2 Plaintiff filed a Complaint alleging several causes of action, including sexual harassment and unjust
3 firing. Defendants filed the present Motion on January 21, 2009, seeking to dismiss all charges due
4 to a lack of jurisdiction.

5 **II. Standard of Review for Motion to Dismiss**

6 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken as
7 true and construed in a light most favorable to the non-moving party.” Wyler Summit Partnership v.
8 Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a
9 court does not necessarily assume the truth of legal conclusions merely because they are cast in the
10 form of factual allegations in a plaintiff’s complaint. See Clegg v. Cult Awareness Network, 18 F.3d
11 752, 754–55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure
12 to state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation
13 omitted). The issue is not whether Plaintiffs will ultimately prevail, but whether he may offer
14 evidence in support of his claims. See id. at 249 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236
15 (1974)). Consequently, the Court may not grant a Motion to Dismiss for failure to state a claim
16 “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim
17 which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also, Hicks v.
18 Small, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows that the plaintiff is entitled
19 to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks
20 for improper relief. See United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963).

21 **III. Jurisdictional Requirements**

22 Here, Defendants aver that Plaintiff has failed to establish federal jurisdiction and is unable to
23 do so. Plaintiff’s Complaint does fail to explicitly state the basis on which jurisdiction is established,
24 but the Defendants aver that no such basis could be established. In the absence of a clear statement
25 of jurisdiction by the pro se Plaintiff, the Court will assume that Plaintiff is asserting either diversity
26 of citizenship or subject-matter jurisdiction.

1 **A. Diversity Jurisdiction**

2 A district court has original jurisdiction when the amount in controversy exceeds \$75,000 and
 3 the parties are citizens of different states. 28 U.S.C. § 1332(a)(1). When examining a case brought
 4 under the diversity jurisdiction statute, the Court is required to address two issues: whether the
 5 amount in controversy exceeds \$75,000 and whether there is complete diversity among the parties.
 6 Nowhere in his Complaint or Response in Opposition does Plaintiff specify that more than \$75,000
 7 is at issue. Furthermore, Plaintiff alleges that all parties involved are “located in Nevada.” (Compl.
 8 at 2–3.) Although being located in a state does not establish citizenship, Plaintiff fails to clarify the
 9 citizenship of Defendants in his Response in Opposition. Plaintiff has failed to provide evidence that
 10 total diversity of citizenship exists and has failed to specify that the jurisdictional threshold amount
 11 of \$75,000 has been met. Therefore, the Court finds that diversity of citizenship has not been
 12 established.

13 **B. Subject-Matter Jurisdiction**

14 A district may also have jurisdiction over civil actions “arising under the Constitution, laws
 15 and treaties of the United States.” 28 U.S.C. § 1331. Here, Plaintiff alleges that Defendants have
 16 violated three specific sections of the United States Code: 18 U.S.C. §§ 241 and 242, and 42 U.S.C.
 17 § 2000e-2 (“Title VII”).

18 The Ninth Circuit has held that 18 U.S.C. § 241, which deals with conspiracy against civil
 19 rights, and section 242, which deals with the deprivation of rights under the color of law, provide “no
 20 basis for civil liability.” Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). Therefore, the
 21 Court does not have subject-matter jurisdiction over civil claims ostensibly brought under sections
 22 241 and 242.

23 In addition, before a district court may have jurisdiction over any Title VII claim, including
 24 sexual harassment claims, a plaintiff must have exhausted his administrative remedies, by “filing a
 25 timely charge with the EEOC, or the appropriate state agency.” B.K.B. v. Maui Police Dep't, 276
 26 F.3d 1091, 1099 (9th Cir. 2002); See 42 U.S.C. 2000e-5.

1 Here, Plaintiff has made no showing of having submitted a claim to the EEOC as required by
2 Title VII. The Court finds that Plaintiff has not exhausted his administrative remedies. Thus, the
3 Court has no jurisdiction to hear any of Plaintiff's claims arising under Title VII. Furthermore, as the
4 Court does not have jurisdiction over any of the claims brought under federal statutes, the Court finds
5 that subject-matter jurisdiction does not exist.

6 **IV. Conclusion**

7 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#10) is
8 **GRANTED;**

9 IT IS FURTHER ORDERED that Plaintiff's Motion to Show Retaliation (#16) is **DENIED**
10 as moot;

11 IT IS FURTHER ORDERED that Plaintiff's Motions for Default Judgment (#27 and #32) are
12 **DENIED** as moot;

13 IT IS FURTHER ORDERED that Defendants' Motion to Quash (#33) is **DENIED** as moot;

14 IT IS FURTHER ORDERED that Plaintiff's Motion to Compel (#36) is **DENIED** as moot.

15 DATED this 21ST day of May 2009.

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19 Kent J. Dawson
20 United States District Judge
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